

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





# 76-1574

To be argued by  
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,  
Plaintiff-Appellee,  
-against-  
EDWARD MAULDIN,  
Defendant-Appellant.  
-----X

*Bp/s*

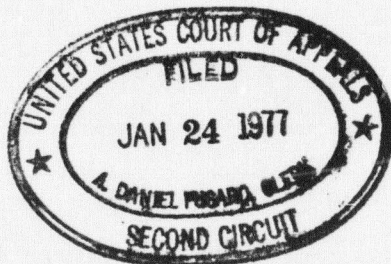
Docket No. 76-1574

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BRIEF FOR APPELLANT

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ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTION PRESENTED

Whether the trial judge committed reversible error when he refused to exercise his discretion to exclude evidence of the claimed similar act.



STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a conviction had after a jury trial in the United States District Court for the Southern District of New York (The Honorable John M. Cannella) finding appellant Edward Mauldin guilty of bank robbery, in violation of 18 U.S.C. §2113(a) (Count One), 18 U.S.C. §2113(b) (Count Two), and 18 U.S.C. §2113(d) (Count Three). Appellant was sentenced as a youthful offender to an indeterminate six-year period of incarceration (18 U.S.C. §5010(b)) to run concurrently with an earlier conviction for bank robbery.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant was charged in a three-count indictment with the January 16, 1975, robbery of the North New York Savings Bank, located on East 188th Street in the Bronx.\* The Government's theory of the case was that appellant was one of three men who robbed the bank and that he was the robber who

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\*The indictment is "B" to the separate appendix to appellant's brief.



stationed himself under the surveillance camera and acted as lookout for the group.

The Government presented the testimony of Marie Addorisio, a bank teller (11-22\*), and Janet Tobin, an assistant manager at the bank (22-32), both of whom were eyewitnesses to the robbery. These witnesses described how three men entered the bank, one vaulted over the counter to collect the money, one ordered the bank personnel to the floor, and the third stayed near the door under the surveillance camera. Although both witnesses had a clear and unobstructed view of the man the Government claimed was Mauldin, neither witness could identify Mauldin as that man (15-16, 26-27). According to these witnesses, the robbers were all black, and each wore a blue parka with a fur-trimmed hood (14, 25). The man alleged to be Mauldin was described by Tobin as being approximately 5'11" tall and having a "slight build" (26), and by Addorisio as being approximately 6'1" tall (14). Both witnesses related how this man, who carried a folded newspaper in his left hand, kept jumping up in an attempt to hit the surveillance camera with the paper (17, 24). Neither witness ever saw this man touch the camera with his hand; according to these witnesses' observations, he used a newspaper at all times (21, 24-25).

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\*Numerals in parentheses refer to pages of the transcript of the trial.



The only evidence in the Government's case\* which purported to establish that Mauldin was the robber who was stationed beneath the surveillance camera was certain fingerprint testimony and the introduction, over strenuous defense objection, of a claimed similar act.

Michael J. McHale, a special agent with the Federal Bureau of Investigation, testified that he found and preserved a fingerprint on the bottom of the bank surveillance camera (42). McHale conceded that he had no way of knowing how long the print had been on the camera. In response to questions by defense counsel on voir dire (51), McHale admitted that the print was sent to the Identification Division and remained there for a month, during which time McHale had no personal knowledge as to its custody (43-44). Moreover, after the print was returned to the Bureau, it remained for more than one year in a room which, although locked, was freely accessible to all Bureau employees\*\* (45).

Jack Oliver, a fingerprint specialist, testified that the latent print allegedly taken from the surveillance camera in the bank was made by Edward Mauldin (59).

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\*Other evidence in the Government's case was directed at establishing that the bank was insured by the Federal Deposit Insurance Corporation (36) and that the bank audit revealed a loss of \$20,000 in the robbery, and that Mauldin did not have an account at the bank (33-34). The evidence also revealed, however, that the bank provided services to the general public, not only depositors (34-35).

\*\*McHale also testified that when he interviewed Mauldin he learned that he was 6'3" tall (48).



The Government's last piece of evidence was a claimed similar act -- the April 3, 1975, robbery of the First National City Bank branch at Duane and Elk Streets in Manhattan.\* The admissibility of this evidence was the subject of a lengthy conference held outside the presence of the jury (60-81). Defense counsel argued that the crimes were not sufficiently similar: they occurred in distant parts of the city; the First National City Bank robbery was accomplished by one man who approached the teller and demanded the money; absent from the First National City Bank robbery was the carefully executed plan of the North New York Bank robbery.

Apparently persuaded by counsel's arguments, the judge inquired whether the Government could appeal his exclusion of the evidence (71). Upon learning that the Government could not appeal, the judge admitted the evidence (78).

Raymond Kranglewitz, a New York City police officer, testified\*\* that he arrested Mauldin as the latter attempted to escape from First National City Bank after the robbery (82-85). The witness asserted that, at the time of arrest, Mauldin was wearing a blue snorkel jacket (86).

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\*Mauldin was convicted of this robbery on October 7, 1975.

\*\*Just prior to Kranglewitz' testimony, the judge suggested that the Government delay introduction of this evidence until rebuttal. This suggestion was rejected (82).



In his summation, the prosecutor argued strenuously that the First National City Bank robbery was proof that Mauldin was the man who committed the North New York Bank robbery on trial. Referring to "[t]he First National City Bank on Duane Street, right across from this courthouse" (110-111), the prosecutor entreated the jury:

[T]hat makes absolutely clear, makes absolutely convincing beyond question one and the same man participated in both these robberies, that one and the same man was Edward Mauldin.

(112).

After the charge to the jury\* and deliberations, the jury returned a verdict of guilty on all three counts (171).

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\*The charge to the jury is "C" to the separate appendix to appellant's brief. The charge included direction on the probative value of prior similar acts (158-159).



### ARGUMENT

THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR WHEN HE REFUSED TO EXERCISE HIS DISCRETION TO EXCLUDE EVIDENCE OF THE CLAIMED SIMILAR ACT.

Evidence of a crime not charged in the indictment is inadmissible if its purpose or necessary effect will be to convey to the jury that the defendant is a bad man and is therefore guilty of the crime charged. United States v. Kaufman, 453 F.2d 306, 311 (2d Cir. 1971)

While a similar act may be admissible to prove identity of the perpetrator of the crime charged, it is essential as a preliminary matter for the Government to establish that the basic physical elements of both crimes are identical. United States v. Chestnut, 533 F.2d 40 (2d Cir.), cert. denied 97 S.Ct. 88 (1976); United States v. Santiago, 528 F.2d 1130 (2d Cir. 1976); United States v. Leonard, 524 F.2d 1076, 1091 (2d Cir. 1975); United States v. Pollard, 509 F.2d 601, 604 (5th Cir. 1975); 2 Wigmore §302 at 200-201 (3d ed. 1940).

In the trial below, over strenuous defense objection, a similar act was introduced into evidence despite the Government's total failure to establish the requisite identity between that act admitted and the crime charged in the indictment. The objected to evidence was proof of appellant Mauldin's commission of a robbery of the First National City Bank at Duane and Elk Streets in lower Manhattan. While the crime on trial was



also a bank robbery that fact was woefully inadequate to establish the needed similarity.

This is especially true in light of the dramatic difference between the facts of each crime. The robbery on trial was of the North New York Savings Bank located on 188th Street in the Bronx. According to the eye witnesses the robbery was accomplished by three men, well-organized and well-disciplined. One robber vaulted the teller's counter to collect the money, the second guarded the bank employees and the third acted as look-out and attempted to prevent the taking of surveillance photographs. The plan was a complicated one and was expertly coordinated. All of the robbers successfully escaped from the bank.

In contrast, the "similar" act introduced was the robbery of a First National City Bank which is located at virtually the other end of the city. This robbery, for which Mauldin was already convicted was relatively amateurish in execution. Only one robber was involved and it was obvious that he was following no previously devised plan: he simply approached the teller and demanded the money.

Absent identity of the modus operandi the fact that Mauldin had been convicted of the First National City Bank robbery is no proof that he was the unidentified look-out at the North New York Bank robbery. On the state of this record, the absence of similarity is not sufficiently compensated for by the mere fact that both the robber of North New York and First National City Bank were wearing blue parkas. Cf. United States v. Drew, 331



F.2d 85, 92 (D.C. Cir. 1964). Common clothing apparel in a city the size of New York is virtually irrelevant.

Without doubt it was within the discretion of the trial judge to rule on the admissibility of this evidence. United States v. Leonard, supra, 524 F.2d at 1092; United States v. Deaton, 381 F.2d 114, 117 (2d Cir. 1967). The record in this case reveals that the judge refused to do that. The judge's inquiry concerning the Government's right to appeal should the evidence be excluded indicates that he was persuaded that the prejudicial effect of the evidence outweighed its probative value. The decision to admit the evidence was the improper result of the judge's concern that the Government would be unable to challenge the exclusion of the evidence.

That the judge believed that the evidence was of little probative value is further apparent from his suggestion that the Government save the evidence until rebuttal. See United States v. Deaton, supra, 381 F.2d at 117 n.3. Clearly, by this suggestion the judge was hoping to develop more substantial justification for admitting the evidence. That justification never came and the evidence was improperly admitted.

On these facts the only use to which the jury could put the objected to evidence was to conclude improperly, that Mauldin because he had robbed the First National City Bank had also robbed the North New York Bank. The effect of the evidence would necessarily prejudice the jury's evaluation of the remainder of the evidence in the case. The prosecutor insured that this



would happen by his arguments in summation which were aimed at describing the First National City Bank robbery so that it would seem to the jurors that it was part of and affected their own lives.\*

That the remainder of the Government's case included fingerprint evidence does not mitigate the prejudice of the admission of the First National City Bank robbery. Fingerprint evidence is not infallible. Cf. United States v. Durant, slip op., 635 (2d Cir. November 24, 1976). Especially so in this case where there was a dispute as to whether the third robber ever touched the camera and as to when Mauldin's fingerprint was put there. Moreover, the fingerprint in this case has been held by the Government for over a year and the Government failed to establish that the chain of custody had not been broken so there was also a dispute about the legitimacy of the evidence. The judge's failure to exercise his discretion to exclude the "similar" act evidence mandates reversal of the conviction.

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\*What the prosecutor said was, "[t]he First National City Bank on Duane Street, right across from this courthouse", makes clear that Mauldin participated in both these offenses.



CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded for a new trial.

Respectfully submitted,

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January 21, 1977



CERTIFICATE OF SERVICE

January 24 , 1977

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Heidi Sinsten